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IN THE

Supreme Court of the United States

October Term, 1959

No. 841

FRANCES C. DENEHY,
Petitioner,

v.

EDWIN F. HANNON, JR., RECEIVER ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

Supreme Court of the United States

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No.

FRANCES C. DENEHY,
Petitioner,

v.

EDWIN E. HANNON, JR., RECEIVER ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled case on February 24, 1960, affirming the order of the United States District Court for the District of Massachusetts granting the Receiver an injunction and remanding the case to that Court for further proceedings (App., *infra*, p. 15, R. 79).

OPINIONS BELOW

The order of the District Court is not reported but may be found in the Appendix, *infra*, p. 17 (R. 32 and 49).

The opinion of the Court of Appeals promulgated February 24, 1960 affirming the District Court in granting the Receiver an injunction and remanding the case for further proceedings is not reported but may be found in the Appendix, *infra*, p. 9-15 (R. 73).

JURISDICTION

The judgment of the Court of Appeals was made and entered on February 24, 1960 (App., *infra*, p. 15, R. 79). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

I

Whether a Federal appointed receiver, who submits to the jurisdiction of a State court by filing a general appearance may invoke the jurisdiction of the Federal Courts at a later date.

II

Whether the setting aside of the petitioner's mortgage to the extent of satisfying a tax lien against real property to pay judgments against other parties for Federal income taxes is unlawful under Federal tax law.

III

Whether the decision and judgment of the Court of Appeals, remanding the case for further proceedings not inconsistent with its opinion resulting in the setting aside of petitioner's mortgage against real estate, to the extent necessary to satisfy a Federal income tax lien, of income taxes incurred by others, deprives petitioner of her property without due process of law under the Fifth Amendment to the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Statutes

Massachusetts General Laws, Chapter 183:

Section 1 (App. F, infra, p. 23).
Section 4 (App. F, infra, p. 23).

Constitutional Provisions

Amendment V to The Constitution of the United States of America (App. F, *infra*, p.).

STATEMENT OF THE CASE

The original action was brought during the year 1955, in the United States District Court for the District of Massachusetts, by the United States against Charles M. Fauci Co., Inc. and Charles M. Fauci, taxpayers based upon decrees of the Tax Court of the United States and against the petitioner and other defendants as transferees of the taxpayers. The action was in the nature of a bill to reach and apply. (App. *infra* p. 10, R. 73)

On April 23, 1958 a judgment was entered against the taxpayers, Charles M. Fauci Co., Inc. and Charles M. Fauci, as transferee in the amount of $156,686.68 (App. *infra*. p. 19, R. 56-58). The only reference material to the petitioner in said judgment is found in paragraph 11 which provides:

(11) That costs in the amount of $ be taxed against defendants Charles M. Fauci Co., Inc., Charles M. Fauci, Frances C. Denehy, Edna Fauci, Atlas Liquor Co., Irving Himmell and Virginia Himmel.

The judgment further provided (App. E, *infra*. p. 19, R. 56):

(5) That the claim and lien of the United States with respect to the property located at 127 Mystic Avenue, Medford, 129-131 Mystic Avenue, Medford, 139-141 Mystic Avenue, Medford and 41-43 Stanhope Street, Boston, has priority over the claims of all parties to this action.

On August 21, 1959, Frances C. Denehy petitioned in the Land Court of the Commonwealth of Massachusetts for an order of sale under the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (R. 20) showing that she was the holder of a mortgage against the real property known as the Mystic Avenue property, dated January 7, 1947, and praying that an order be entered permitting her to foreclose (R. 21). The Receiver filed a general appearance in the State Court, to the petition to foreclose. The Receiver, on October 6, 1959, filed his petition in the Federal District Court for the District of Massachusetts (R. 16) for an injunction and order restraining petitioner from foreclosing the mortgage. On October 8, 1959, petitioner filed her Motions to Dismiss the Receiver's petition and attacking the jurisdiction of the Federal District Court (R. 22-23).

On the same day, October 8, 1959, a hearing was held on the temporary injunction and the petitioner's motions to dismiss were denied. On October 9, 1959, an order was issued granting the Receiver a Temporary Injunction (App. *infra* p. 16, R. 32). On October 15, 1959, a further hearing was held on the Receiver's application for a permanent injunction. Again the petitioner filed Motions to Dismiss and attacking the jurisdiction of the Federal District Court (R. 47). The motions were dismissed and a permanent injunction granted the Receiver on October 15, 1959, (App. *infra* p. 17, R. 49).

The petitioner herein appealed to the United States Court of Appeals for the First Circuit. On February 24, 1960, the Court of Appeals entered an opinion (R. 73) and judgment (R. 79) affirming the District Court's judg-

ment granting the Receiver an injunction and remanding the case for further proceedings to the District Court (App. *infra*, Opinion p. 9, Judgment p. 15).

The petitioner now prays that a writ of certiorari be issued by this Honorable Court to review the aforesaid judgment of the United States Court of Appeals for the First Circuit.

REASONS FOR GRANTING THE WRIT

I

This case involves substantial questions of Federal tax law and Constitutional law.

The petitioner respectfully submits that in its opinion and judgment the Court of Appeals did not determine the issue raised by the petitioner regarding the jurisdiction of the Federal District Court to maintain the Receiver's petition for an injunction when as a matter of fact the Receiver had filed his general appearance in the State Court prior to bringing his petition.

A person once within a Court's jurisdiction remains therein for purposes of the entire proceedings.

Michigan Trust Co. v. *Ferry*, 228 U.S. 346, 33 S. Ct. 550.

Consequently, a Court has jurisdiction conferred upon it when a defendant enters a general appearance, being an appearance for some purpose other than that of raising a jurisdictional question.

Withers v. *Starace*, 22 F. Supp. 773. *Ward* v. *Todd*, 103 U.S. 327.

The petitioner on this ground submits that a person acting under an appointment by a Federal Court cannot appear generally in a State Court and at a later date invoke the jurisdiction of the Federal Court under his appointment.

Mays v. *Fritton*, 87 U.S. 414.

II

To set aside the petitioner's mortgage to the extent of the Federal tax lien is to force the petitioner to pay for debts owed by others. The mortgage was prior in point of time, and priority, as between Federal tax liens and competing liens, is to be determined by the application of the principle that "the first in time is the first in right", *United States* v. *New Britain*, 347 U.S. 81, 85.

The opinion of the Court of Appeals (R. 73, 77, App., *infra*, p. 13) states that the petitioner did not raise the question of the mortgage on the real property involved at the hearing of the suit brought by the United States in the nature of a bill to reach and apply. The complaint in that suit (R. 62) did not seek any money judgment against the petitioner Frances C. Denehy and the judgment of the District Court did not cover any money judgment or any judgment except costs against the petitioner (R. 57).* The mortgage, which was a matter of record, had been recorded, as required by the General Laws of Massachusetts, and should have fully protected the petitioner.

The judgment of the District Court was to be interpreted in the light of the Court's findings and conclusion of law, applicable to matters in dispute at the trial.

Great Lakes Dredge & Dock Co. v. *Hoffman*, 63 S. Ct. 1070, 319 U.S. 293.

It is a universal rule that a prior lien gives a prior claim, which is entitled to a prior satisfaction out of the subject it binds, unless the lien be intrinsically defective or is displaced by some act of the party holding it, which

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* The tax liability of petitioner as transferee, in the amount of $1,000.00, was determined by a decision of the Tax Court of the United States, April 2, 1951, Docket No. 22540, and this liability was paid. Hence the complaint could not seek a money judgment against petitioner. (App. F, infra, p. 22.)

shall postpone him in a Court of law or equity to a subsequent claimant.

Rankin v. *Scott*, 25 U.S. 177.

The petitioner's mortgage on the property was not listed in the Bill of Complaint filed by the United States against Charles M. Fauci et al. (R. 62-67). The single circumstances of not proceeding to enforce a prior lien until a subsequent lien has been obtained and carried into execution will not destroy the priority of the first lien.

Rankin v. *Scott*, 25 U.S. 177.

III

To set aside the petitioners mortgage to the extent of the Federal lien for the payment of delinquent taxes owed by others has the effect of depriving your petitioner of her property without due process of law. The sale of one person's property to pay for the debts of another violates the Fifth Amendment. There is no money judgment against the petitioner (App. E, *infra*, p., R. 57) and the setting aside of the petitioner's mortgage to the extent of the Federal tax lien is not for the purpose of collecting a judgment against the petitioner herself.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOSEPH A. TODISCO,
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Boston 8, Massachusetts.
Counsel for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5594

EDNA M. FAUCI, DEFENDANT, APPELLANT

v.

EDWIN F. HANNON, JR., RECEIVER, ET AL., APPELLEES

No. 5595

FRANCES C. DENEHY, DEFENDANT, APPELLANT

v.

SAME.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Vincent Mottola for Edna M. Fauci, appellant.

Joseph A. Todisco, with whom *Nedio E. Barrasso* and *William H. Lewis, Jr.*, were on brief, for Frances C. Denehy, appellant.

Thomas E. Goode and *George C. Caner, Jr.*, Assistant U. S. Attorney, with whom *Elliot L. Richardson*, United

States Attorney, was on brief, for Edwin F. Hannon, Jr., Receiver, and United States of America, appellees.

OPINION OF THE COURT

February 24, 1960

ALDRICH, *Circuit Judge.* In 1955 an action in the nature of a bill to reach and apply was brought in the district court for the District of Massachusetts by the United States against Charles M. Fauci Co., Inc., and Charles M. Fauci, hereinafter called taxpayers, and a number of other defendants, including the present appellants Edna M. Fauci, hereinafter called Fauci, and Frances C. Denehy. The complaint alleged that deficiencies had been assessed against the taxpayers, creating tax liens in favor of the United States on taxpayers' property and rights to property; that the taxpayers were insolvent during the taxable years in question and subsequently; that appellants and other defendants had received certain property from taxpayers without giving adequate consideration therefor; that the taxpayers were entitled to the return of such property; and "that by virtue of its liens upon all property or rights to property of [taxpayers] . . . the United States is entitled to such property, or its proceeds, in the hands of the [appellants and] other defendants . . . [and] is further entitled to the benefits of all other rights and claims . . . [taxpayers] may have against such . . . defendants . . . ." Among the property described in the complaint was real estate located at 139-141 Mystic Avenue, Medford, Massachusetts, hereinafter called the locus. On April 23, 1958, following a jury verdict, the district court entered a judgment which provided that the government should recover $156,686.68 from the taxpayers, and that Edwin F. Hannon, Jr., appellee herein, be appointed as receiver to sell certain real property, including the locus, and deposit

the proceeds in court. Paragraph 5 of the judgment provided, "That the claim and lien of the United States with respect to the property located at . . . 139-141 Mystic Avenue, Medford, . . . has priority over the claims of all parties to this action." Paragraph 7 provided, "That plaintiff have judgment against Edna M. Fauci in the amount of $3,185.54 with interest . . . ." No money judgment was rendered against Denehy. It was further provided that the total amount to be recovered by the government "from all property involved and from all defendants shall not exceed $156,686.68 plus interest and costs . . . ." Both appellants failed to prosecute their appeals from this judgment.

In September, 1959 appellee, hereinafter called the receiver, was prepared to sell the locus. Fauci thereupon sought an injunction against him in the district court, alleging in her petition that she was the owner of the locus and that she had tendered and was still tendering the amount owed by her under paragraph 7 of the judgment. Her position was that this tender satisfied her only obligation under the judgment, and that she was therefore entitled to assert her ownership interest in the locus and prevent the sale. The court entered an order denying the petition, and Fauci appeals.

In October, 1959 the receiver proceeded in the district court against Denehy, alleging that she was seeking in the Land Court of the Commonwealth of Massachusetts to foreclose a mortgage upon the locus; that he had been given notice of the proceedings, and that such action was in derogation of his rights under the judgment and cast a cloud upon the title to the property which he was seeking to sell pursuant thereto. The district court issued a temporary injunction, which it thereafter made permanent. In its final order it permanently enjoined Denehy from claiming title to or any other interest in the locus, and ordered her to execute and deliver to the receiver a discharge of the mortgage. Denehy appeals.

We deal first with the Fauci appeal. Fauci contends that the court cannot go behind the judgment, even to the extent of examining the complaint upon which it is based. Although this contention is erroneous, see, e.g., *Oklahoma* v. *Texas*, 1921, 256 U.S. 70, 87-88, we will assume for the sake of argument that appellant is entitled to rest her case on the judgment as it stands alone. It is true that the payment of the amount tendered would discharge Fauci's personal monetary obligation under paragraph 7. However, within the four corners of the judgment it is apparent that this was not the only matter determined. Paragraph 5, which is without any limitation here relevant, unambiguously provides that the government's lien against the locus "has priority over the claims of all parties to this action." This means all claims. Appellant was a party. She offers no explanation why any claim of hers is to be excluded, or why she is not bound by this portion of the judgment. On its face the government's lien is not limited by the amount stated in paragraph 7, but will exist until the government has recovered $156,686.68. Appellant makes no suggestion that her tender would accomplish that result. Her appeal is without merit.*

Denehy, unlike Fauci, bases her case on the proposition that the judgment must be interpreted in the light of the prior proceedings. Her contention is that the matter of her mortgage was not before the district court and was not passed upon because no allegations were made, and no evidence was introduced, specifically concerning it. However, Denehy herself was before the court, and the

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* Although appellee has not raised the issue, we note in passing that Fauci's appeal may well be moot since the record shows that the property was actually sold on October 17, 1959, after notice of appeal was filed, but before argument. Although appellant requested a stay of the sale in the district court, the request was denied, no appeal from that order was taken, and no stay was sought in this court.

complaint raised the general issue of whether, so far as creditors were concerned, ownership of the locus was to be regarded as in the taxpayers as distinguished from the other defendants. More specifically, paragraph 15 of the complaint in the original action named appellant as one of the defendants who had received property from the taxpayer, and the locus was listed, in subparagraph (c), as part of the property in question. Appellant's answer to this part of the complaint was that, "Defendant Denehy denies each and every allegation made by the plaintiff in Paragraph 15 of the Complaint insofar as it concerns her interest and property mentioned in Sub-Paragraphs a, b, c, d and g . . . . ," and alleged insufficient knowledge to answer as to the other property. It seems apparent that appellant thereby admitted that she had an interest in the locus and merely denied that it was subject to return to the taxpayers vis-à-vis the government's claim. Moreover, the statute under which the proceedings were brought, 26 U.S.C. §7403(c), Int. Rev. Code of 1954, required the court "to adjudicate all matters involved . . . and finally determine the merits of all claims to and liens upon the property . . . ." The judgment did not purport simply to set aside certain specific transfers, but was full and complete so far as the government's lien was concerned. If its terms were excessive and unwarranted, this was a matter to be raised before the court at that time, a course which Denehy failed to take. Having remained silent as to her alleged mortgage, and having permitted the suit to proceed to a broad and final decree determining rights in the locus, appellant cannot now attempt to retry those issues "in an independent suit based solely upon a title that [s]he was a liberty to set up, but chose not to assert, before the decree was rendered." *Dowell* v. *Applegate*, 1894, 152 U.S. 327, 343. Under these circumstances, Denehy's prosecution of the Land Court proceedings constituted a collateral attack upon the judgment, and was in derogation of the receiver's rights there-

under. The district court clearly had the requisite power, in the course of an ancillary proceeding, to protect its judgment and effectuate the receivership by in effect enjoining the further prosecution of the Land Court proceedings. See, e.g., *Wabash R.R.* v. *Adelbert College*, 1908, 208 U.S. 38, 54, *reh. den.*, 208 U.S. 609.

Denehy argues that even if the court could prevent her from interfering with the receiver's sale by enjoining her from claiming title to, or an interest in, the locus, it was without power to amend its judgment at that late date by ordering her to convey a discharge of the mortgage. The receiver's position is that the court was not amending its judgment, but, rather, was enforcing it. We believe that this portion of the order was unnecessary and excessive. The receiver had only possession of the locus, not the title thereto. Nor did the original judgment attempt to settle the question of where title to the property lay as between taxpayers and the other defendants. It merely provided that as between the government and other persons with an interest in the locus the government's lien had priority. To satisfy this lien the property was to be sold, but if there was an excess, that was to be disposed of by further order of the court. While the conveyances may have been fraudulent as to the government, they were not declared invalid as between the immediate parties. The government was entitled to have the mortgage set aside only to the extent necessary to satisfy its claim. The decree should not order the mortgage's discharge, but should merely reaffirm that it does not constitute a lien on the premises as against the government, or anyone claiming under or through the government, and that to this extent appellant is enjoined from setting up or claiming any rights thereunder.

In No. 5594, judgment will enter affirming the order of the District Court; in No. 5595, judgment will enter vacating the order of the District Court and remanding the case to that court for further proceedings not inconsistent with this opinion.

APPENDIX B

On the same day, February 24, 1960, the following judgment was entered in case No. 5595:

JUDGMENT

February 24, 1960

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered adjudged and decreed as follows: The order of the District Court is vacated and the case is remanded to that Court for further proceedings not inconsistent with the opinion passed down this day.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

Approved:

/s/ PETER WOODBURY, C.J.

APPENDIX C

Order on Temporary Injunction.

[October 9, 1959.]

This cause came on to be heard upon prayer one of the Petitioner, Edwin F. Hannon, Jr., Receiver, for an injunction to temporarily restrain the defendant, Frances C. Denehy from foreclosing an alleged mortgage upon a certain parcel of land with the buildings thereon known and numbered 139-141 Mystic Avenue in the City of Medford, Commonwealth of Massachusetts; it appearing that the said Frances C. Denehy has filed a petition in the Land Court of the Commonwealth of Massachusetts, Docket #30127, in which she seeks an order of sale prior to a sale under a power of sale on a first mortgage in accordance with the Soldiers and Sailors Relief Act of 1940, as amended, asserting in said petition a mortgage on the said premises 139-141 Mystic Avenue, Medford, and it further appearing that the validity of the said alleged mortgage as against the claim of the United States having been heretofore adjudicated in this cause and a judgment having been entered decreeing that the claim and lien of the United States with respect to the said property has priority over the claims of all parties to this action, and ordering the sale of the said property and the payment of the proceeds into court, and it further appearing that the said property is being advertised to be sold on October 17, 1959.

Wherefore, it is Ordered, Adjudged and Decreed that the defendant, Frances C. Denehy, be temporarily enjoined, until further order of court, from attempting to foreclose the alleged mortgage on the property known and numbered 139-141 Mystic Avenue, Medford, and referred to in a certain petition to the Land Court of the Commonwealth of Massachusetts as heretofore set forth.

GEO. C. SWEENEY
United States District Judge

Date 10/9/59

APPENDIX D

Order on Permanent Injunction.

[October 15, 1959.]

This cause came on to be heard upon prayers three and four of the Petitioner, Edwin F. Hannon, Jr., Receiver, for an injunction to permanently restrain the defendant, Frances C. Denehy from foreclosing an alleged mortgage upon a certain parcel of land with the buildings thereon known and numbered 139-141 Mystic Avenue in the City of Medford, Commonwealth of Massachusetts; it appearing that the said Frances C. Denehy has filed a petition in the Land Court of the Commonwealth of Massachusetts, Docket #30127, in which she seeks an order of sale prior to a sale under a power of sale on a first mortgage in accordance with the Soldiers and Sailors Relief Act of 1940, as amended, asserting in said petition a mortgage on the said premises 139-141 Mystic Avenue, Medford, and it further appearing that the validity of the said alleged mortgage as against the claim of the United States having been heretofore adjudicated in this cause and a judgment having been entered decreeing that the claim and lien of the United States with respect to the said property has priority over the claims of all parties to this action, and ordering the sale of the said property and the payment of the proceeds into court, and it further appearing that the said property is being advertised to be sold on October 17, 1959.

Wherefore, it is Ordered, Adjudged and Decreed that the defendant, Frances C. Denehy, be permanently enjoined from claiming title to, or any other interest in the property referred to in the judgment of this Court in this cause and it is further Ordered, Adjudged and Decreed that the defendant, Frances C. Denehy, shall be forthwith execute and deliver to the Receiver herein, Edwin F. Han-

non, Jr., a discharge of the mortgage given to the said Frances C. Denehy by Charles M. Fauci dated January 4, 1947 and recorded with Middlesex South Registry of Deeds, Book 7084, Page 447.

GEO. C. SWEENEY
United States District Judge

Date 10/15/59

APPENDIX E

Judgment.

[Entered April 23, 1958]

Upon consideration of the pleadings, the evidence and the verdict returned by the jury on March 22, 1957, in favor of the plaintiff against defendants Charles M. Fauci, Frances C. Denehy, Edna M. Fauci, Irving Himmel, Virginia Himmel, Atlas Liquor Co., and Edwin W. Hadley and Nathan Loeb as Trustees of the Mystic Avenue Real Estate Trust,

IT IS ORDERED, ADJUDGED AND DECREED

(1) That plaintiff have judgment against C. M. Fauci Co., Inc. in the amount of $156,686.68 plus interest at 6% from June 23, 1949.

(2) That plaintiff have judgment against Charles M. Fauci as transferee of C. M. Fauci Co., Inc. in the amount of $156,686.68 plus interest at 6% from June 23, 1949.

(3) That Edwin F. Hannon, Jr. be appointed as receiver to sell the real property located at 127 Mystic Avenue, Medford, 129-131 Mystic Avenue, Medford, 139-141 Mystic Avenue, Medford, and 41-43 Stanhope Street, Boston.

(4) That the proceeds of the sale of the aforesaid property be deposited in the Registry of Court.

(5) That the claim and lien of the United States with respect to the property located at 127 Mystic Avenue, Medford, 129-131 Mystic Avenue, Medford, 139-141 Mystic Avenue, Medford, and 41-43 Stanhope Street, Boston, has priority over the claims of all parties to this action.

(6) That the proceeds of the sale of the property described in paragraph 3 shall be first distributed, by order

of Court, to plaintiff United States of America in satisfaction of its judgments against C. M. Fauci Co., Inc. and Charles M. Fauci, with any excess to be distributed as shall be provided by the Court.

(7) That plaintiff have judgment against Edna M. Fauci in the amount of $3,185.54 with interest at 6 per cent from May 11, 1953.

(8) That plaintiff have judgment against Atlas Liquor Company in the amount of $55,000.00, (the value of the assets of the C.M. Fauci Co. transferred to the Mystic Liquor Co. (subsequently known as Atlas Liquor Co.) on 12/28/48) with interest at 6 per cent from February 24, 1949.

(9) That plaintiff have judgment against Virginia Himmel in the amount of $54,000.00, (the value of all of the outstanding stock of the Atlas Liquor Co. on February 17, 1950), with interest at 6 per cent from February 17, 1950.

(10) That plaintiff have judgment against Irving Himmel in the amount of $7,547.24 with interest at 6 per cent from September 30, 1956.

(11) That costs in the amount of $..... be taxed against defendants, C. M. Fauci Co., Inc., Charles M. Fauci, Frances C. Denehy, Edna Fauci, Atlas Liquor Co., Irving Himmel, and Virginia Himmel.

(12) That the total amount to be recovered by the United States in this action from all property involved and from all defendants shall not exceed $156,686.68 plus interest and costs as provided by law.

(13) That any and all amounts paid by any and all defendants in satisfaction of the aforesaid judgments shall be paid into the Registry of the Court.

(14) That the order entered on May 23, 1956, ordering the trustees of the Mystic Avenue Real Estate Trust

to pay $200. per month to Charles M. Fauci and Frances Denehy be vacated and that said trustees, Edwin W. Hadley and Nathan Loeb are ordered not to make any further payments out of trust assets or income to Charles M. Fauci or Frances Denehy.

GEO. C. SWEENEY
United States District Judge

Receivers bond to be in the amount of $10,000.00

GCS.

APPENDIX F

[SEAL]

THE TAX COURT OF THE UNITED STATES
Washington

Docket No. 22540

FRANCES C. DENTHY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DECISION

Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Court on March 21, 1951, at Washington, D. C., it is

ORDERED and DECIDED: That there is a liability on the part of petitioner for income tax for the calendar year 1943 in the amount of $1,000.00, as transferee of assets of Charles M. Fauci, Medford, Massachusetts, transferor, and no penalty liability for said year; that there are no liabilities on the part of petitioner for income tax and penalties for the calendar years 1944 and 1945 as transferee of assets of Charles M. Fauci, Medford, Massachusetts, transferor.

/s/ John W. Pierce
Judge.

Entered Apr 2 1951

Served Apr 3 1951

APPENDIX G

Mass. General Laws (Ter. Ed.) Chapter 183, Section 1

A deed executed and delivered by the person, or by the attorney of the person, having authority therefor, shall, subject to the limitations of section four, be sufficient, without any other act or ceremony, to convey land.

Mass. General Laws (Ter. Ed.) Chapter 183, Section 4

A conveyance of an estate in fee simple, fee tail or for life, or a lease for more than seven years from the making thereof, shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it, unless it, or an office copy as provided in section thirteen of chapter thirty-six, or, with respect to such a lease, a notice of lease, as hereinafter defined, is recorded in the registry of deeds for the county or district in which the land to which it relates lies. A "notice of lease", as used in this section, shall mean an instrument in writing executed by all persons who are parties to the lease of which notice is given and shall contain the following information with reference to such lease:—the date of execution thereof and a description, in the form contained in such lease, of the premises demised, and the term of such lease, with the date of commencement of such term and all rights of extension or renewal.

The Constitution of the United States of America

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in the actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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MAY 8 1969
JOHN F. DAVIS, Clerk

Supreme Court of the United States.

October Term, 1969.

No. 841.

FRANCES C. DENEHY, *Petitioner*,

v.

UNITED STATES OF AMERICA, THE DISTRICT DIRECTOR OF INTERNAL REVENUE, BOSTON, MASSACHUSETTS DISTRICT AND EDWIN F. HANNON, JR., EXECUTOR, *Respondents*.

RESPONDENT EDWIN F. HANNON'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 841.

FRANCES C. DENEHY, *Petitioner*,

v.

UNITED STATES OF AMERICA, THE DISTRICT DIRECTOR OF INTERNAL REVENUE, BOSTON, MASSACHUSETTS DISTRICT AND EDWIN F. HANNON, JR., RECEIVER, *Respondents*.

RESPONDENT EDWIN F. HANNON'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The petitioner seeks by her petition to upset the decision of the United States District Court for the District of Massachusetts, unreported, and so much of the decision of the Court of Appeals for the First Circuit reported at 275 F. 2d 234 (1960) as affirmed the decision of the District Court.

Question Presented.

Whether the petitioner, who was a party to a judgment of the United States District Court for the District of Massachusetts entered on April 23, 1958, which judgment

indicated that the United States by virtue of a tax lien had a title paramount to the petitioner's to certain real estate in Medford, Massachusetts, was properly enjoined by that Court from proceeding further with foreclosure proceedings on an alleged mortgage in the Land Court of the Commonwealth of Massachusetts.

Statute Involved.

26 U.S.C. Section 7403.

Statement of the Case.

This petition arises from an action by the United States to recover delinquent taxes. The case does not involve a conflict of decisions between different Courts of Appeals, nor new or doubtful questions of law, nor a conflict between the decision of the Court of Appeals and the applicable decisions of this Court or any other Court. The petition raises no matter of public interest or importance.

On June 22, 1955, the United States filed a complaint seeking to recover delinquent taxes of $156,686.88 assessed against taxpayers Charles M. Fauci Company, Inc., and Charles M. Fauci (R. 62-67). The complaint recited the assessment of deficiencies against the taxpayers, creating tax liens in favor of the United States on the taxpayers' property and rights to property (pars. 4, 8), the filing of notices of lien (pars. 6, 10), that the taxpayers had rights in certain real estate at 127, 129-131 and 139-141 Mystic Avenue, Medford, and 41-43 Stanhope Street, Boston (par. 15), that the United States was entitled to such properties in the right of the taxpayers (pars. 15, 16), and that during the period involved, while the taxpayers were in-

solvent, they conveyed property to various named defendants, among them Frances C. Denehy, without giving adequate consideration for the property (pars. 13, 14). It prayed for personal judgments of $156,686.68 against the defendant taxpayers (prayers 1, 2), satisfaction by the other named defendants of the tax claims to the extent of transfers to them of the taxpayers' properties (prayer 5), and enforcement of the tax liens of the United States against the properties and rights to property of the defendant taxpayers (prayer 6). Petitioner Frances C. Denehy filed an answer[1] (R. 67-68), as did the other defendants. Following dismissal by the Court of Appeals of an appeal from an interlocutory order in the case (*United States* v. *Fauci*, 242 F. 2d 237 (1957)), a trial was had on the issue of liability, and a verdict was returned for the United States on March 12, 1957. On April 22, 1958, a trial before the District Court was had on the issue of damages. On April 23, 1958, judgment was entered, ordering, *inter alia*, that the real estate be sold and decreeing that the claim and lien of the United States to the real estate had priority over the claims of all the parties to the action (R. 2-4). The judgment was later amended, on October 1, 1958, and November 4, 1958, in certain respects not here material.[2]

An appeal from the judgment of April 23, 1958, to the Court of Appeals was taken by Frances C. Denehy. The appeal was dismissed for want of diligent prosecution on May 11, 1959 (R. 62).

On or about August 21, 1959, the petitioner filed a petition in the Land Court of the Commonwealth of Massachusetts (R. 20) against Edwin F. Hannon, Jr., Receiver.

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[1] Frances C. Denehy nowhere in her answer in the main case referred to or set up the mortgage which in her Massachusetts Land Court petition she claimed to have on 139-141 Mystic Avenue.

[2] These were the only occasions when the judgment was amended.

It is not disputed[3] that the property in question, on which Frances Denehy claimed in her petition to have a mortgage, is also the property located at 139-141 Mystic Avenue, Medford. See argument of Denehy's attorney (R. 37, 39). The Receiver, on October 6, 1959, filed a petition for restraining order and other relief (R. 16-20), alleging that Denehy had filed the Land Court petition, a copy of which was attached (par. 2), and that the Land Court petition was a collateral attack on the judgment of April 23, 1958, and constituted contempt of the Court (par. 8). The petition prayed that Denehy be temporarily and permanently enjoined from attempting to foreclose the mortgage referred to in the Land Court petition (prayers 1, 2), that Denehy be permanently enjoined from claiming title to, or any other interest in, the property referred to in the judgment (prayer 3), and that Denehy be ordered to execute and deliver to the Receiver a discharge of the mortgage (prayer 4). After hearings on these prayers, at which times the bringing of the Land Court petition by Denehy was conceded (see argument of Denehy's counsel, R. 29, 35; 36), the prayers were granted (R. 32, 33, 49, 50), various motions of Denehy attacking the Receiver's petition were denied (R. 48, 49) and an order was entered (R. 49, 50) permanently enjoining Denehy from claiming title to or any other interest in the property referred to in the judgment and commanding that she deliver to the Receiver

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[3] *E.g.* (R. 39): "Mr. Lewis . . . The mortgage Frances C. Denehy seeks to foreclose here is on a parcel of real estate in Medford, known and numbered 139-141 Mystic Avenue . . ." Denehy filed an answer to the petition of Receiver for restraining order and other relief on October 20, 1959 (R. 53-56). Since the answer was filed after the District Court had finally ruled on the Receiver's petition, following the last order appealed from (order on permanent injunction, entered October 15, 1959, R. 49), by five days, it is not properly part of the record, notwithstanding its inclusion by Denehy in her Record Appendix.

a discharge of the mortgage. The property was bid in at a public sale on October 17, 1959 (petition for confirmation of sale, R. 50-52) and the sale was confirmed by order [4] on October 19, 1959 (R. 53). Denehy's notice of appeal was filed on October 22, 1959 (R. 59). The appeal was taken from the allowance of the Receiver's petition for restraining order and other relief, from the orders granting temporary and permanent injunctions, from the order directing Denehy to deliver a discharge of her mortgage to the Receiver, and from denial of her motions to dismiss the petition asserting lack of jurisdiction and that the Receiver was not a proper party.

The judgment of the Court of Appeals entered on February 24, 1960, upheld the judgment of the District Court except insofar as that judgment ordered the petitioner to execute a discharge of the mortgage in question (R. 78).

Argument.

Paragraph 5 of the judgment of the District Court stated:

> "That the claim and lien of the United States with respect to the property located at 127 Mystic Avenue, Medford, 129-131 Mystic Avenue, Medford, 139-141 Mystic Avenue, Medford, and 41-43 Stanhope Street, Boston, has priority over the claims of all parties to this action." (R. 2.)

The District Court was required by 26 U.S.C. Sec. 7403(C) "to adjudicate all matters involved [in the action] . . . and finally determine the merits of all claims to and

[4] It should be noted that neither appellant appealed from the order confirming the sale.

liens upon the property"; and it was empowered, to effectuate such adjudication, to "decree a sale of such property . . . and a distribution of the proceeds of such sale according to the findings of the Court . . ." The petitioner was represented by counsel, who filed an answer in her behalf (R. 61, 67-71), and took an appeal from the judgment of the District Court. This appeal was dismissed for want of diligent prosecution on June 15, 1959. Her claim of a mortgage on the real estate in question as against the United States is res adjudicata.

The orders of the District Court enjoining the petitioner's action in the Land Court of the Commonwealth of Massachusetts were well within the accepted powers of an Equity Court. *Alexander* v. *Hillman*, 296 U.S. 222, 239 (1935). *Wabash Railroad Co.* v. *Adelbert College of the Western Reserve University*, 208 U.S. 38, 54 (1908). *Murphy* v. *John Hofman Co.*, 211 U.S. 562, 569 (1909). *Julian* v. *Central Trust Co.*, 193 U.S. 93 (1904). *Bethke* v. *Grayburg Oil Co.*, 89 F. 2d 536 (5th Cir. 1937); cert. den. 302 U.S. 739. *Jackson* v. *Carter Oil Co.*, 179 F. 2d 524 (10th Cir. 1950). *City of Fresno* v. *Edmonston*, 131 F. Supp. 421 (S.D. Cal. 1955). 28 U.S.C. Sec. 2283. The petitioner's attempt to realize upon her alleged mortgage constituted a collateral attack upon the judgment of the District Court and that Court was well within its powers in enjoining any further prosecution of the State Court proceedings. *Wabash Railroad Co.* v. *Adelbert College of the Western Reserve University, supra.*

In addition to suggesting that the District Court was without jurisdiction to hear the Receiver's petition for an injunction, the petitioner suggests that, because counsel for the Receiver filed an appearance in the Land Court of the Commonwealth of Massachusetts, he could not seek to restrain petitioner from proceeding in the State Court and urges that this action creates a question for review by

this Court. Such a suggestion ignores the long-established ancillary power of the District Court to enforce its judgments and ignores the fact that petitioner and the other defendants were still before the District Court. Further citation of authorities would be redundant.

The petitioner suggests that she has been deprived of her property without due process of law under the Fifth Amendment to the Constitution of the United States. She states that the sale of her property to pay for the debts of another, as ordered by the Court of Appeals, creates the Constitutional violation. However, by the judgment of both Lower Courts, the petitioner has no proprietary right in the real estate against the United States. The petitioner's argument on this point is baseless.

Conclusion.

This case does not present any novel or substantial issues of law. The petitioner fails to recognize that any claim to a mortgage which she may have has been invalidated as against the United States. It is respectfully submitted that the petition fails to present a question calling for review by the Supreme Court of the United States.

Respectfully submitted,

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